



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL

OFFICE OF THE
SECRETARY

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May 27, 2008

The Honorable Carlos M Gutierrez
Secretary of Commerce
Herbert C. Hoover Building
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

RE: Federal Consistency Appeal by G. Walter Swain

Dear Secretary Gutierrez:

As the Secretary of the State of Delaware's Department of Natural Resources and Environmental Control (DNREC), I submit this letter as my comments for consideration in the above-referenced matter. DNREC's Delaware Coastal Management Program (DCMP) objected to a federal consistency determination for the construction of a 50-slip marina at the confluence of the Mispillion River and Cedar Creek, in Milford, Delaware proposed by Mr. Walter Swain (applicant). The objection was based on several factors including the impacts to migratory shorebirds utilizing Delaware Bay and the unsanctioned use of public subaqueous lands. DNREC's mission is to protect and manage the State's vital natural resources. To that point, I strongly urge you to uphold the DCMP's objection to the proposed Swain's Marina project.

The location for the applicant's proposed marina, Mispillion Harbor, is documented as one of the most critical habitat areas for shorebirds not only in Delaware Bay, but throughout the entire Western Hemisphere as it is one of only a few stopovers during their annual spring migration. Of primary concern is the red knot (*Calidris canutus rufa*), whose 80% population decline warranted its classification as a candidate species for protection under the Endangered Species Act in 2006. Due to its protection from wind and waves, Mispillion Harbor is the prime location for spawning horseshoe crabs (*Limulus polyphemus*) to lay their eggs, a primary food source for shorebirds in Delaware Bay. As such, tens of thousands of migratory shorebirds use the beaches in Mispillion Harbor for feeding and roosting and as much as 80% of the world's population of the *rufa* subspecies of red knot can be found at this location.

Based on the decline of the red knot in the past decade and its vital link to the horseshoe crab populations in Delaware Bay, drastic harvest restrictions have been placed on the horseshoe crab fishery by Delaware and New Jersey in an attempt to save the red knot from extinction. While this has come at a great price for local fishermen dependent on the horseshoe crab bait harvest, this proactive move by the two States to protect a species on the brink of extinction is a reflection of our commitment to resource conservation. The DCMP's objection to the federal consistency certification of the proposed marina

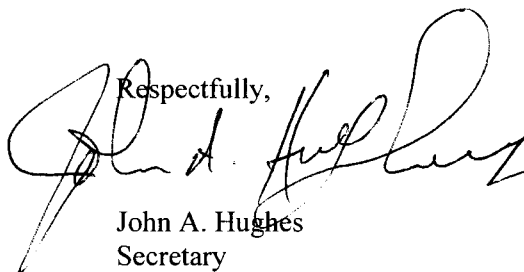
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facility is in line with the management efforts currently implemented to protect the red knot from further decline.

Additionally, the majority of the proposed marina's water-based structures would be constructed on public subaqueous lands. Approving the use of public lands in a manner that would result in such deleterious effects to the natural resources of the State is inconsistent with the public trust and the mission of the Department.

Finally, I raise an issue based upon a technical legal issue Mr. Swain raises in his appeal. He argues that he is entitled to relief as a matter of law based upon a technical error in how the DNREC granted Mr. Swain an extension of time to review his application. While the Department was prepared to issue its objection prior to the end of the six month review period, DNREC offered Mr. Swain the option of receiving an extension, which Mr. Swain accepted by his agent executing a contractual agreement (e.g. DCMP's Stay Agreement, dated June 30, 2007). DNREC reasonably relied upon Mr. Swain's agreement and honored it by not issuing its objections on July 17, 2007. Notwithstanding this agreement, Mr. Swain contends in his appeal that this contract harmed him, that the agreement should be ignored and that, based upon a technical reading of the regulations, he should be entitled to relief as a matter of law. Your agency should not condone such conduct and the appeal process not be used to avoid binding contracts that were entered into in good faith, at least by the Department. Thus, DNREC urges that your agency allow the parties' contractual agreement to stand, which is an interpretation supported by contract law, and that Mr. Swain be estopped from avoiding his contractual agreement, which he willingly accepted in order not to receive an objection on July 17, 2007 that otherwise he would have received but for the contract.

In summary, construction of a 50-slip marina in the Delaware Bay's most critical migratory shorebird stopover, Mispillion Harbor, could have disastrous consequences for the imperiled red knot and other shorebird species of concern. It is imperative that you uphold the decision of the Delaware Coastal Management Program. To do otherwise would undermine the conservation efforts in Delaware Bay.

Respectfully,

John A. Hughes
Secretary

cc: Thomas Street, Attorney-Advisor, NOAA Office of the General Counsel
Senator Joseph R. Biden
Senator Thomas R. Carper
Representative Michael N. Castle
Governor Ruth Ann Minner